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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COONER SALES COMPANY, Plaintiff and Appellant, v. NEW ENGLAND ELECTRIC WIRE CORPORATION et al., Defendants and Respondents.	B201539 (Los Angeles County Super. Ct. No. BS092832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Reversed and remanded with directions.

Edwin W. Duncan, Warren K. Miller and David G. Halm for Plaintiff and Appellant.

Perkins Coie, Donald J. Kula, Sang Lee; Vreeland Law Firm, Inc. and Clayton J. Vreeland for Defendants and Respondents.

INTRODUCTION

Cooner Sales Company, LLC and New England Wire Corporation arbitrated a business dispute four times between 1999 and 2007. Cooner appeals from a judgment which confirmed the 2007 (fourth) arbitration award and vacated the 2004 (third) arbitration award. The trial court found that the 2004 (third) arbitration award failed to include a determination of all questions submitted to the arbitrators the decision of which is necessary to determine the controversy as required by Code of Civil Procedure section 1283.4.[1] Finding this failure "conduct of the arbitrators contrary to the provisions of this title," pursuant to section 1286.2, subdivision (a)(5) the trial court therefore ordered the award to be vacated. We conclude, however, that no violation of section 1283.4 occurred, and that the 2004 (third) arbitration award made determinations of all submitted matters necessary to determine the controversy. Consequently it was error to vacate the 2004 (third) arbitration award, and the judgment should be reversed.

FACTUAL AND PROCEDURAL HISTORY

New England Wire Corporation (NEW) is a New Hampshire corporation that manufactures and sells specialty wire and cable products. From 1957 to 1982, Cooner Sales Company, Inc. and predecessor businesses sold and distributed products manufactured by NEW. On August 24, 1982, Cooner Sales Company and NEW entered into a distribution agreement. Under the distribution agreement, except for "house accounts" and "factory accounts," Cooner Sales Company had the exclusive right to sell NEW's products in Arizona, California, Colorado, New Mexico, Oregon, Utah, and Washington.

In 1983, NEW purchased 10 shares of Cooner Sales Company, and Cooner Sales Company employees Patrick Weir, Joseph Steinberger, and Steven Smith purchased the remaining 65 shares of Cooner Sales Company. Cooner Sales Company changed its name to Cooner Enterprises, Inc. on January 31, 1984, and on that date NEW and Cooner

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[1] Unless otherwise specified, statutes in this opinion will refer to the Code of Civil Procedure.

Enterprises formed a partnership, Cooner Sales Company, a California general partnership.

NEW wholly owns a subsidiary, Technologies. On July 31, 1996, Technologies and Cooner Enterprises entered into a limited liability company operating agreement creating Cooner Sales Company LLC (Cooner), in which Cooner Enterprises owned a 65 percent membership interest and Technologies owned a 35 percent membership interest.

The Trial Arbitration - 1999

NEW apparently attempted to remove Arizona, Colorado, New Mexico, Oregon, and Utah from the distribution agreement, and NEW and Cooner arbitrated this dispute in 1999. The 1999 (first) arbitration award found that after formation of the Cooner Sales Company partnership on January 31, 1984, the distribution agreement became a partnership asset. As partners in Cooner Sales Company, Cooner Enterprises and NEW owed each other fiduciary duties. Subsequent changes in Cooner Sales Company from a partnership to a limited liability company in 1996 did not change these fiduciary duties, which duties would continue as long as NEW, Cooner Enterprises, or any of their affiliates were members or managers of Cooner. NEW breached its fiduciary duty to Cooner Enterprises and Cooner, and did not show good cause exercised in good faith, by purporting to remove Arizona, Colorado, New Mexico, Oregon and Utah from the distribution agreement. Cooner was entitled to the return of its exclusive rights in these states and to recover $16,004 from NEW as profits owed for sales made by NEW in the "protected territory" of the distribution agreement in 1998. The 1999 award found that neither party could terminate or modify the "protected territory" of the distribution agreement except for good cause exercised in good faith. The 1999 award also set forth specific accounts and entities to which NEW could advertise, market, sell, or quote prices for its products, but otherwise prohibited NEW from selling or quoting prices for its products, other than superconductive cable, to any person or entity other than Cooner in the protected territory, without Cooner's express written consent.

The Second Arbitration – 2000

The parties returned to arbitration in 2000, seeking declaratory relief regarding their ongoing relationship, and Cooner also alleged breaches of contract by NEW. The 2000 (second) arbitration award found that Cooner had not proven that NEW had breached the LLC Operating Agreement or the 1999 award; defined certain terms in the 1999 award; and found that NEW could sell its membership interest in Cooner as long as NEW complied, in good faith, with Article IX of the LLC Operating Agreement and relevant provisions of the California Corporations Code. Paragraph 4 of the 2000 (second) arbitration award would later become an issue in the third and four arbitrations. Paragraph 4 stated: "4. Respondents [NEW] may sell their membership interest in Cooner Sales Company LLC so long as they comply, in good faith, with Article IX of the LLC Operating Agreement and the relevant provisions of the California Corporations Code. It is, however, difficult for this panel to imagine the possibility of a 'good faith' sale which did not include in it terms a non-compete clause of reasonable duration." The 2000 award stated that NEW could withdraw from the LLC, but that under the Corporations Code such withdrawal would be wrongful as in violation of the express terms of the Operating Agreement. A withdrawal that breached the LLC Operating Agreement or was wrongful under the Corporations Code would permit the remaining member of the LLC to invoke the "hold harmless" provision of the Operating Agreement, Article XII. The 2000 arbitration agreement stated: "If, following a withdrawal to which consent has not been given, Respondents [NEW] directly compete in the Protected Territory or terminate the exclusive distributorship agreement, Claimant [Cooner] could seek to recover any resulting damages, including loss of future profits."

NEW Sells Its Interest in Cooner Enterprises and Terminates the Distribution Agreement

NEW offered to sell its 35 percent interest in Cooner to Cooner Enterprises, which indicated that it was not interested in purchasing NEW's interest. On December 13, 2002, NEW by letter advised Cooner Enterprises that it had negotiated a sale of NEW's 35 percent interest in Cooner to the Lisbon Regional School Education Foundation

(Lisbon). NEW submitted notice of its intention to sell its membership interest in Cooner in accordance with the right of first refusal of Cooner Enterprises in the Cooner LLC Operating Agreement. NEW's letter included a clause terminating the exclusive distribution agreement of Cooner in California, Oregon, Washington, Arizona, New Mexico, Utah, and Colorado, and stating that NEW would not solicit business in those states from any person known by NEW to be a Cooner customer. The sale to Lisbon closed on January 22, 2003.

The Third Arbitration - 2004

Cooner made a demand for arbitration, claiming that Lisbon was not a bona fide purchaser of NEW's membership interest, the transaction contemplated in the purchase agreement was not a bona fide transaction under Article IX, Section 9.2 of the LLC Agreement, and the proposed sale to Lisbon violated the 1999 and 2000 arbitration awards. NEW's answering statement denied Cooner's claims, asserted that Lisbon was an independent third party having no affiliation with NEW, that the purchase agreement between NEW and Lisbon was negotiated at arms' length and in good faith, and that Cooner's claims that Lisbon was not a bona fide purchaser or that the transaction was not a bona fide transaction had no merit. NEW also asserted that Cooner's claim that the transaction violated the 1999 and 2000 arbitration awards also lacked merit; NEW argued that the NEW-Lisbon purchase agreement complied in good faith with Article IX of the LLC Operating Agreement and relevant provisions of the California Corporations Code, expressly restricted NEW's competition with Cooner LLC for two years after the sale, and provided that NEW would continue to make their products available to Cooner for purchase, on a nonexclusive basis, after the sale.

NEW's opening brief for the 2004 arbitration stated that Paragraph 4 of the 2000 (second) arbitration award was at issue. Paragraph 4 stated: "4. Respondents [NEW] may sell their membership interest in Cooner Sales Company LLC so long as they comply, in good faith, with Article IX of the LLC Operating Agreement and the relevant provisions of the California Corporations Code. It is, however, difficult for this panel to imagine the possibility of a 'good faith' sale which did not include in it terms a non-

compete clause of reasonable duration." NEW argued that it complied with Paragraph 4 of the 2000 (second) arbitration award by selling its interest in Cooner to Lisbon, agreeing not to compete with Cooner for two years, and by giving Cooner the right of first refusal regarding the sale. NEW stated that Cooner did not respond to NEW's offer of the right of first refusal to the sale, and instead commenced the 2004 arbitration, seeking declaratory relief that Lisbon was not a bona fide purchaser and the sale was not a bona fide transaction, and that the sale violated prior arbitration awards. Thus NEW identified two issues to be decided in the 2004 arbitration:

"1. Was the sale to the Foundation a bona fide transaction?

"2. Did the sale to the Foundation violate the prior arbitration awards?" ~(CA 58)~

The 2004 (third) arbitration award stated the issues to be decided as follows: "The parties have asked this tribunal to determine the validity of the Purchase Agreement [between Lisbon and NEW], and specifically whether the transactions contemplated by the Purchase Agreement comply with the [July 31, 1996] Operating Agreement [between NEW and Cooner], the California Corporations Code and the prior arbitration awards[.]" ~(CA 82)~ The arbitrator's award found:

1. The sale contemplated by the Purchase Agreement between Lisbon and NEW was not a bona fide sale made in good faith, did not comply with the prior arbitration awards, and did not comply with Article IX of the Operating Agreement and relevant provisions of the California Corporations Code. Therefore NEW's purported sale of its Cooner membership interest was null and void.

2. NEW's January 16, 2003, termination of the sales representative and distributor arrangements with Cooner was rescinded, and NEW and Cooner should be returned to the status quo existing before the purported termination on January 16, 2003.

3. NEW should calculate commissions and profits it would have paid to Cooner but for the purported termination, and within 30 days NEW should deliver to Cooner payment equal to the amount of the lost commissions and profits, along with commission statements, customer names and other customer information required to return to the status quo ante.

4. Cooner was the substantially prevailing party.

5. NEW was to pay Cooner $180,000 as reimbursement of reasonable attorney's fees and expenses.

6. NEW would bear $4,450 in administrative fees and $9,788 compensation of the Arbitrator." The award concluded: "All claims not expressly granted herein are hereby, denied.

NEW filed a request for amendment of the Arbitrator's award to address an issue submitted by the parties that the 2004 arbitration award did not address. NEW requested "that the Arbitrator amend the June Award to address the general interpretation issue concerning Paragraph 4 from the Second Award dated September 2000[.]"

On September 15, 2004, the Arbitrator cited rule 48 of the American Arbitration Association Commercial Arbitration Rules stating that an Arbitrator was not empowered to redetermine the merits of a claim already decided, and advised the parties that the Arbitrator had no authority to clarify or modify the Award.

On October 1, 2004, NEW filed a petition in superior court to vacate the 2004 arbitration award. The petition alleged that NEW's rights were substantially prejudiced by the arbitrator's failure to include in the 2004 Award a determination of all questions submitted, the decision of which was necessary in order to determine the controversy as required by section 1283.4.

NEW's petition argued that the interpretation of Paragraph 4 of the 2000 Award, addressing NEW's right to sell its interest in Cooner and terminate the Distribution agreement, was the issue at the heart of the parties' dispute. In the arbitration, Cooner argued that one reason the transaction with Lisbon was not bona fide was that it violated the prior arbitration awards because Cooner contended that NEW was required to receive

Cooner's permission before terminating or modifying the Distribution Agreement, even if NEW sold its interest in Cooner and was no longer a member of Cooner. NEW, by contrast, argued that Paragraph 4 of the 2000 Award specifically contemplated that NEW could sell its interest in Cooner and could terminate the Distribution Agreement in connection with the sale, provided that NEW gave Cooner a non-competition clause of reasonable duration.

The petition argued that the issues before the Arbitrator were: (1) what was the correct interpretation of Paragraph 4 of the 2000 award with respect to NEW's right to sell its interest in Cooner and terminate the Distribution Agreement, and (2) was the transaction with Lisbon not bona fide for any of the factual reasons argued by Cooner that were unrelated to the interpretation issue. NEW argued that "[a]bsent an answer on the first issue, the parties will be left with no resolution of their dispute regarding the meaning of Paragraph 4 of the Second Award and whether [NEW] must obtain Cooner's permission before terminating the Distribution Agreement even if [NEW] first sells its interest in Cooner."

On October 19, 2004, Cooner filed a petition to confirm the arbitration award.

On February 10, 2005, by minute order Judge Rodney Nelson granted the petition to vacate the 2004 arbitration award.

On March 2, 2005, the trial court filed a "final order," signed by Judge Nelson, granting NEW's petition to vacate the arbitration award, ordering the 2004 (third) arbitration award vacated and without force or effect, denying Cooner's petition to confirm the arbitration award, and ordering a rehearing in arbitration before a new arbitrator. The judgment stated that, pursuant to section 1292.6, the trial court retained jurisdiction of the matter for the limited purpose of determining any subsequent petition to confirm or vacate any future arbitration award involving the same agreement to arbitrate and the same controversy.

On April 6, 2005, Judge Nelson, by minute order, set aside the order filed on March 2, 2005, and set aside and vacated the February 10, 2005, minute order granting the petition to set aside the arbitration award.

On May 9, 2005, Judge Nelson, by minute order granted a motion to confirm the arbitration award, and denied a motion of petitioner [NEW].

On May 12, 2005, the Presiding Judge of the Superior Court placed Judge Nelson on forced leave of absence.

On July 20, 2005, a written formal order signed by Judge Joseph R. Kalin granted NEW's motion to vacate the May 9, 2005, minute order due to lack of subject matter jurisdiction. The order stated that the final order filed on March 2, 2005, resolved all matters before the court, granted NEW's petition to vacate the arbitration award, ordered a new hearing in arbitration before a new arbitrator or panel of arbitrators, and denied Cooner's cross-petition to confirm the subject award. The order stated that upon entry of the March 2, 2005, final order, the trial court had no jurisdiction to enter its orders of April 6, 2005, April 12, 2005, or May 9, 2005, and declared those three orders to be null and void, vacated, and of no force or effect. The parties were ordered to proceed in accordance with the March 2, 2005, final order.

The Fourth Arbitration - 2007

NEW initiated a new, fourth arbitration on August 25, 2005. NEW identified the issues to be resolved in the fourth arbitration as: (1) the meaning of the 2000 (second) award, and the parties' rights and obligations under that award, and specifically whether NEW could terminate its distribution agreement with Cooner by selling NEW's 35 percent interest in Cooner to a third party; (2) whether NEW's January 2003 sale of its 35 percent interest in Cooner to Lisbon was a bona fide sale, such that NEW could, and did, terminate the distribution agreement with Cooner by this sale; (3) whether Lisbon was a bona fide entity, separate and apart from NEW and legally capable of purchasing NEW's 35 percent interest in Cooner; (4) whether a change in circumstances—that since January 2003 Cooner's board of managers had no representative designated by NEW—rendered no longer res judicata a provision from the 1999 award that prohibited NEW from terminating the distribution agreement because it owed a fiduciary duty to Cooner; and (5) whether Cooner should be required to pay NEW the amounts NEW had paid Cooner pursuant to the now-vacated third 2004 award.

1. *Summary Adjudication Before Arbitrator*

The parties presented the dispute about the meaning of Paragraph 4 of the 2000 (second) award to the arbitrator (R. Mainland) by mutual summary adjudication motions. The arbitrator's summary adjudication order of July 7, 2006, found that termination of the distribution agreement by NEW after it sold its membership interest in Cooner would not amount to a taking of Cooner's assets in violation of the Operating Agreement or the Corporations Code. The arbitrator also found that the 2000 (second) award permitted NEW to terminate the distribution agreement after a sale of its membership interest in Cooner. The arbitrator found that Article IX of the Operating Agreement did not prohibit NEW from terminating the distribution agreement after a sale of its interest in Cooner. Although section 9.1 prohibited a member from disposing of Cooner's "assets," the arbitrator concluded that by exercising its contractual right to terminate the distribution agreement NEW would not be disposing of an "asset" belonging to Cooner. The only other limitation in Article IX on NEW's right to sell its interest was that it be in a bona fide transaction and subject to Cooner's right of first refusal.

The arbitrator found that Cooner had cited no provisions of the Corporations Code prohibiting a member of a limited liability company or a partnership from terminating an agreement with an LLC upon sale of a member's or partner's interest. The arbitrator also found that upon sale of a partner's interest, the partner's fiduciary duty to other partners ended, and therefore NEW's exercise of its contractual rights to terminate the distribution agreement after a sale of its interest in Cooner breached no fiduciary duty to Cooner.

Therefore the arbitrator denied Cooner's summary adjudication motion and granted NEW's summary adjudication motion.

2. *Proceedings Before Judge Kalin at the Same Time the Fourth Arbitration Was Being Conducted*

In a December 28, 2006, minute order, Judge Kalin stated that Cooner (on May 17, 2006) filed a section 1008, subdivision (b) motion for reconsideration of the March 2, 2005, order vacating the 2004 (third) arbitration award made by Judge Nelson, who had since retired as a superior court judge, and for renewal of its petition to confirm that 2004

(third) arbitration award. Cooner's motion contended that Judge Nelson, when he made the March 2, 2005, order, was physically and mentally incapacitated, rendering him incapable of logical decision making. NEW argued that Cooner was delinquent in filing its motion, because Cooner knew in the several months after the March 2, 2005, order that Judge Nelson was being investigated by the Presiding Judge and the Commission of Judicial Performance regarding his capacity to act as a judge, and knew Judge Nelson was placed on leave based on numerous complaints regarding his judicial actions. Judge Kalin found that when making the March 2, 2005 order, Judge Nelson had long-standing cognitive impairment and was not capable of performing his judicial duties. Judge Kalin then addressed whether Cooner's motion for reconsideration of the March 2, 2005, order was timely pursuant to section 1008, subdivision (b), i.e., whether Cooner' proceeded with diligence. Judge Kalin found that as early as February 10, 2005, there were issues regarding Judge Nelson's decision-making ability, and that Judge Nelson's placement on involuntary leave on May 12, 2005, and the filing of a formal proceeding by the commission on Judicial Performance on December 5, 2005, put Cooner's counsel on notice as to Judge Nelson's capacity to sit as a judge. Judge Kalin found that only when that commission dismissed its proceedings (on the day Judge Nelson took voluntary retirement) did medical reports concerning Judge Nelson become available to form the basis for the present motion. Thus Judge Kalin found Cooner's motion timely, as the new and different evidence necessary to make the motion was only available when the commission released the medical reports. Judge Kalin granted Cooner's section 1008, subdivision (b) motion, vacated the March 2, 2005, order, ordered the parties to file copies of the original motions to confirm and to vacate and supporting papers, and stated that the court would thereafter set the matter for a hearing on those motions.

3. *The Partial Final Arbitration Award in the Fourth Arbitration*

In a "partial final arbitration award" issued on January 16, 2007, the arbitrator reaffirmed the July 7, 2006 order denying Cooner's summary adjudication motion and granting NEW's summary adjudication motion. The award further found that NEW's sale of its membership interest in Cooner to Lisbon was a bona fide sale that complied

with Article IX of the Operating Agreement, the Corporations Code, and the 1999 (first) and 2000 (second) arbitration awards; that valid and adequate consideration supported the sale; and that the sale was not a donation. The purchase agreement between NEW and Lisbon dated December 12, 2002 (the purchase agreement) contained a covenant not to compete of reasonable duration, from January 22, 2003, through January 22, 2005. NEW complied with the right of first refusal provision in paragraph 9.2 of the Operating Agreement in connection with the sale. For these reasons, the arbitrator confirmed the sale and denied Cooner's request that it be rescinded.

The arbitrator found that Lisbon was a bona fide entity, independent of and not controlled by NEW and capable of purchasing NEW's interest in Cooner. Lisbon's purchase of NEW's interest in Cooner complied with Lisbon's charter and with New Hampshire law, which permitted Lisbon to purchase an interest in a profit-making limited liability company such as Cooner. The arbitrator found that the transaction was not void as an "insider" or "pecuniary benefit" transaction."

The arbitrator found that effective February 1, 2003, NEW terminated its exclusive distribution agreement and terminated Cooner as its sales representative and any associated price discount arrangement. The arbitrator confirmed those terminations as lawful, valid, and binding.

The arbitrator found that NEW's sale of its interest in Cooner to Lisbon, its termination of the exclusive distribution and sales representative agreements with Cooner, and NEW's preparations for the sale and its termination while still a member of Cooner did not breach NEW's fiduciary duties to Cooner. The arbitrator found that NEW and Lisbon did not breach or conspire to breach fiduciary duties owed by NEW to Cooner in connection with the sale and termination.

The arbitrator found that because of changes in fact and law since the 1999 (first) award, that award should not be given res judicata or collateral estoppel effect on Cooner's claim that NEW's February 1, 2003, termination of the exclusive arrangements with Cooner breached NEW's fiduciary duties. The arbitrator therefore found that even if the sale of NEW's interest in Cooner to Lisbon were not considered to be a bona fide

sale within the meaning of the 1999 (first) award, NEW's termination of its exclusive distribution agreement and sale representative arrangement with Cooner effective February 1, 2003, did not breach NEW's fiduciary duty to Cooner.

The arbitrator ordered Cooner to pay NEW $492,288.81, representing commissions NEW paid to Cooner as required by the 2004 (third) award, which the superior court subsequently vacated on March 2, 2005. Cooner was also ordered to pay $187,412.67 in attorney's fees and costs that the 2004 (third) award awarded to Cooner and against NEW and which NEW had paid to Cooner. The arbitrator found NEW and Lisbon were prevailing parties and should recover reasonable attorney's fees and costs from Cooner, determined that Cooner should bear administrative fees, and stated that the arbitrator's final award would rule on NEW's application for attorney's fees and expenses, and on the amount of administrative fees. On January 16, 2007, the arbitrator also denied Cooner's Application for a Stay of the Fourth Arbitration.

4. *The Arbitrator's Final Award*

On February 14, 2007, Judge Ron Sohigian apparently consolidated the rehearings regarding the third and fourth arbitration awards.

The arbitrator's final award, dated March 26, 2007, found that NEW should recover from Cooner reasonable attorney's fees of $1,127,253 and costs of $84,233.12, Lisbon should recover from Cooner reasonable attorney's fees of $108,205 and costs of $17,659.07, and Cooner should bear administrative fees of $16,336.50 and fees and expenses of the arbitrator of $85,852.55. The arbitrator therefore ordered Cooner to reimburse NEW in the sum of $45,220.53 (representing that portion of fees and expenses in excess of apportioned costs previously incurred by NEW) and ordered Cooner to reimburse Lisbon in the sum of $19,268.87 (representing that portion of fees and expenses in excess of apportioned costs previously incurred by Lisbon).

The arbitration award stated that any claims, defenses, or contentions not specifically mentioned in the award were denied.

5. Judge Sohigian Confirms the Fourth Arbitration Award and Vacates the Third Arbitration Award

On May 18, 2007, Judge Sohigian granted NEW's motion to confirm the 2007 (fourth) arbitration award and denied Cooner's petition to vacate that award. The order also ordered the 2004 (third) arbitration award vacated and not confirmed, finding that the arbitrator's conduct substantially prejudiced NEW's rights by failing to determine all questions submitted to the arbitrator.

On June 27, 2007, the judgment confirming the fourth 2007 arbitration award and vacating the third 2004 award was filed. The judgment ordered the June 25, 2004 (third) arbitration award vacated, and ordered the March 26, 2007 (fourth) arbitration confirmed; ordered NEW to recover from Cooner $1,936,408.13, plus 10 percent annual interest from March 26, 2007, and costs of suit; and ordered Lisbon to recover from Cooner $145,132.94, plus ten percent annual interest from March 26, 2007, and costs of suit.

Notice of entry of judgment was served on June 28, 2007. Cooner filed a timely notice of appeal from the June 27, 2007, judgment.

ISSUES

Cooner claims on appeal that:

1. California law requires conformation of the 2004 (third) arbitration award; and
2. The 2007 (fourth) arbitration award should be vacated.

DISCUSSION

Cooner takes its appeal from the June 27, 2007, judgment confirming the 2007 (fourth) arbitration award and vacating the 2004 (third) arbitration award. Cooner argues that California law requires confirmation of the 2004 (third) arbitration award. A preliminary issue concerns whether Cooner has taken its appeal from an appealable order.

1. *Appealability*

A. *The March 2, 2005, Order Was Not an Appealable Order*

The March 2, 2005, "final order," signed by Judge Nelson, granted NEW's petition to vacate the 2004 (third) arbitration award, ordered that arbitration award vacated, ordered a rehearing in arbitration before a new arbitrator or new panel of arbitrators, and denied Cooner's petition to confirm that arbitration award.

Section 1294 states, in relevant part: "An aggrieved party may appeal from:

"[¶] . . . [¶]

"(b) An order dismissing a petition to confirm, correct or vacate an award.

"(c) "An order vacating an award unless a rehearing in arbitration is ordered.

"(d) A judgment entered pursuant to this title."

An order that vacates an arbitration award and does not order a rehearing in arbitration is appealable. (*SWAB Financial v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1195.) The March 2, 2005, order, however, denied Cooner's petition to confirm, granted NEW's petition to vacate the 2004 (third) arbitration award, and ordered a rehearing in arbitration. Because such an order contemplates further arbitration proceedings, it is not appealable. (*Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 Cal.App.4th 434, 442; *Sy First Family Ltd., Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1345; *National Indemnity Co. v. Superior Court* (1972) 27 Cal.App.3d 345, 348, fn 3.)

Therefore the March 2, 2005, "final judgment" remained an interlocutory order. As such it can be reviewed from the judgment confirming the 2007 (fourth) arbitration award and vacating the 2004 (third) arbitration award, which is appealable. (*Carpenters 46 Northern Cal. Counties Conf. Bd. v. David D. Bohannon Organization* (1980) 102 Cal.App.3d 360, 363; Code Civ. Proc. §1294, subd. (d).)

B. *The May 18, 2007, Statement of Decision Was Not the Appealable Order, and Cooner Timely Filed Its Notice of Appeal From the June 27, 2007, Judgment*

NEW claims that the May 18, 2007, order was immediately appealable under section 1294, subdivision (c) as an order vacating and setting aside the 2004 (third)

arbitration award without ordering a rehearing in arbitration, and that therefore Cooner's notice of appeal filed on August 17, 2007, was untimely.

The May 18, 2007, order: granted NEW's motion to confirm the 2007 (fourth) arbitration award and denied Cooner's petition to vacate that award; ordered the 2004 (third) award vacated and not confirmed; stated that the May 18, 2007, order was the statement of decision unless any party specified controverted issues or made proposals not covered in the order, in which case NEW was to prepare a final statement of decision and obtain the other parties' approval; and ordered NEW within 15 days to prepare, serve, obtain other parties' approval, and lodge a judgment with the court. The May 18, 2007, order also set a June 27, 2007, hearing for settlement of the form and substance of judgment and signing of judgment, determination of what remained to be done in future proceedings, and for the status of the present case.

A judgment is a final determination of the parties' rights. To determine whether an adjudication is final and appealable, " '[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative. . . . [W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' " (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) An order directing the preparation of a subsequent judgment is merely a preliminary order and is not itself appealable. (*Brown v. Municipal Court* (1978) 86 Cal.App.3d 357, 360, fn 1; *Billings v. California Coastal Com*. (1980) 103 Cal.App.3d 729, 733, fn 1.) The May 18, 2008, order contemplated, and ordered, the preparation and subsequent signing and entry of a judgment. Thus it was the June 27, 2007, judgment that was appealable, not the May 18, 2008, order.

Cooner therefore timely filed a notice of appeal from the June 27, 2007, judgment.

2. *The 2004 (Third) Arbitration Award Made Findings on All Issues Submitted to Arbitration, and the Orders Vacating That Award and Confirming the 2007 (Fourth) Award Should be Reversed*

Cooner claims on appeal that the trial court erroneously vacated the 2004 (third) arbitration award. We agree.

A. *Vacation of an Arbitration Award for the Arbitrator's Failure to Find on All Issues Submitted to Arbitration*

"[I]t is the general rule that, '[t]he merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. [Citations.] [¶] Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.)

Section 1286.2, subdivision (a) sets forth the main statutory exception to this general rule precluding judicial review, and sets forth the only grounds for judicial review of an arbitration award. (*Allstate Ins. Co. v. Superior Court* (2006) 142 Cal.App.4th 356, 362-363.) Section 1286.2, subdivision (a) states, in relevant part: "Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

"[¶] . . . [¶]

"(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

One of "the provisions of this title" is section 1283.4, which states that the arbitration award "shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." The failure to find on all issues submitted to arbitration is a statutory ground for vacating an award. (*Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 841.) The failure to determine an issue submitted, however, is not error unless such a determination " 'is necessary in order

to determine the controversy.' " (*Cothron v. Interinsurance Exchange* (1980) 103 Cal.App.3d 853, 860.)

Four principles guide this court's review of whether the arbitration award failed to determine all questions submitted to arbitrators. First, all issues submitted for decision are presumed to have been passed on and resolved, and the party challenging the award bears the burden of proving otherwise. Second, to discharge that burden, the party attacking the award must show that a particular claim was expressly raised before the award and that the arbitrator failed to consider it. Third, the arbitrator's failure to make a finding on even an express claim does not invalidate the award, so long as the award serves to settle the entire controversy. Fourth, the merits of the controversy are for the arbitrator, not for the courts, which do not review the sufficiency of the evidence before the arbitrator, pass upon the validity of the arbitrator's reasoning, or review the award for legal error. (*Rodrigues v. Keller* (1980) 113 Cal.App.3d 838, 842-843.)

B. *The 2004 (Third) Arbitration Award Determined All Questions Necessary to Determine the Controversy, and Therefore Vacation of the Award Was Error*

Cooner's demand for arbitration of January 10, 2003, identified the nature of the dispute as arising from NEW's proposed sale of its membership in Cooner pursuant to an LLC Membership Interest Purchase Agreement. "Cooner claims that [Lisbon], the purchaser of [NEW's] membership interest in Cooner under the Purchase Agreement, is not a bona fide purchaser and the transaction contemplated in the Purchase Agreement is not a bona fide transaction under Article IX, Section 9.2 of the LLC Agreement. Cooner also claims that the transaction contemplated by the Purchase Agreement violates the prior awards[.]"

NEW's answering statement asserted, first, that pursuant to the December 12, 2002 purchase agreement, NEW transferred its interest in Cooner to Lisbon, an independent third party having no affiliation with NEW; that the purchase agreement was negotiated at arms length and in good faith; and that Cooner's contention that Lisbon was not a bona fide purchaser or that the sale to Lisbon was not a bona fide transaction had no merit. Second, NEW's answering statement asserted that there was no merit to Cooner's

assertion that the sale transaction violated two prior arbitration awards, and stated that the 2000 (second) arbitration award explicitly contemplated a transaction like that embodied in the purchase agreement. NEW argued: "Nor is there any merit to Claimant's assertion that the transaction violates two prior awards issued by the American Arbitration Association in Case No. 72 199 00212 98 and Case No. 72 199 01009 99. To the contrary, the award in Case No. 72 199 01009 99 explicitly contemplates a transaction along the lines of that embodied in the Purchase Agreement. Paragraph 4 of the Final Award in that case states that 'Respondents may sell their membership interest in Cooner Sales Company LLC so long as they comply, in good faith, with Article IX of the LLC Operating Agreement and the relevant provisions of the California Corporations Code.' In negotiating and entering into the Purchase Agreement, Respondents did precisely that. Moreover, the Purchase Agreement takes up the arbitrators' suggestion that the terms of any such sale should include 'a non-compete clause of reasonable duration' by expressly restricting Respondents' competition with Cooner Sales Company LLC for two years after the sale. In addition, the Purchase Agreement also expressly provides that Respondents will continue to make their products available to Claimant for purchase, on a nonexclusive basis, after the sale. Thus, the transaction is entirely consistent with the Final Award in Case No. 72 199 01009 99."

NEW's opening brief in the 2004 (third) arbitration stated: At issue in this dispute is Paragraph 4 of the award from the second arbitration between the parties. That paragraph provides: "4. Respondents may sell their membership interest in Cooner Sales Company LLC so long as they comply, in good faith, with Article IX of the LLC Operating Agreement and the relevant provisions of the California Corporations Code. It is, however, difficult for this panel to imagine the possibility of a 'good faith' sale which did not include in its terms a non-compete clause of reasonable duration." NEW stated that based on Paragraph 4, it sold its interest in Cooner to Lisbon, agreed as part of that sale not to compete with Cooner for two years, and gave Cooner the right of first refusal in regard to the sale. Cooner, however, commenced the arbitration seeking declaratory relief. According to NEW, Cooner argued that any sale by NEW that resulted in the

termination of the distribution agreement would make the sale a sham. NEW argued that Paragraph 4 allowed it to sell its interest in Cooner and then terminate the distribution agreement as long as it acted in good faith and provided Cooner a non-compete clause of reasonable duration. NEW argued: "In the second arbitration [2002 award], the panel plainly contemplated that the termination of the Distribution Agreement would accompany any sale of NEWS's interest in Cooner – and it authorized the transfer nonetheless." NEW stated that the arbitration therefore presented two specific issues: was the sale to Lisbon a bona fide transaction, and did the sale to Lisbon violate the prior arbitration awards.

NEW specifically argued that it structured its sale to Lisbon of its interest in Cooner to comply with Paragraph 4 of the second arbitration award, both in the specific sale terms and in the two-year non-competition clause given to Cooner, and argued that Paragraph 4 confirmed that NEW had the right to sell its interest in Cooner and to thereby end its partnership with Cooner.

Cooner argued that its ownership of the exclusive right to sell NEW products in the protected territory was Cooner's asset, which NEW could not terminate without Cooner's consent. Cooner argued that NEW's sale of its membership in Cooner to Lisbon could not be bona fide and violated the Operating Agreement because it provided for NEW's removal of Cooner's asset—the protected territory—without Cooner's consent in violation of prior arbitration awards and California law. Cooner argued that Paragraph 4 allowed NEW to withdraw from or to transfer its interest in Cooner as long as it did so legally and in good faith. Cooner, however, asserted that NEW, by transferring its Cooner membership interest to Lisbon, had not complied in good faith with Article IX of the Operating Agreement. Cooner argued, inter alia, that the sale could not be bona fide and in good faith because no one in good faith would purchase an interest in Cooner under these circumstances, the Foundation did not conduct due diligence about Cooner's business, and NEW's president and CEO was a founding trustee of the Foundation and NEW officers and employees were Foundation Trustees.

The 2004 (third) arbitration award stated that the parties asked the arbitrator to determine the validity of the purchase agreement, and whether the transactions contemplated by the purchase agreement complied with the Operating Agreement, the Corporations Code, and two prior arbitration awards. This corresponds to the issues submitted by the parties. We disagree that the parties asked the arbitrator, or that the arbitrator was required, to independently interpret Paragraph 4 of the 2000 (second) award. The issue between the parties was not the meaning, or the validity, of Paragraph 4. The issue was whether NEW's sale to Lisbon of its membership interest in Cooner complied with Paragraph 4 of the second award. Cooner's demand for arbitration included its claim that the transaction contemplated by the purchase agreement violated prior awards. NEW's answering statement stated that the award in the second arbitration "explicitly contemplates a transaction along the lines of that embodied in the Purchase Agreement[,]" quoted Paragraph 4, and stated that the Purchase Agreement complied with Paragraph 4, included a non-compete clause of reasonable duration by expressly restricting NEW's competition with Cooner for two years after the sale, and expressly provided that NEW would continue to make its products available to Cooner for purchase, on a nonexclusive basis, after the sale. NEW concluded that therefore "the transaction is entirely consistent with the Final Award in [the second 2000 arbitration]."

NEW's opening brief stated that the 2004 (third) arbitration presented "two specific issues:

"1. Was the sale to [Lisbon] a *bona fide* transaction?

"2. Did the sale to [Lisbon] violate the prior arbitration awards?" NEW's opening brief then addressed both issues. It argued that the sale to Lisbon was a bona fide transaction and did not violate the prior arbitration awards, and specifically stated: "New England Wire's sale of its interest in Cooner to [Lisbon] was specifically structured to comply with the above quoted Paragraph 4 in the second arbitration award. This includes both the specific terms of the sale between New England Wire and [Lisbon], as well as the two-year non-compete given to Cooner."

The 2004 (third) arbitration award specifically addressed, first, whether the sale to Lisbon was a bona fide transaction. It stated: "The sale contemplated by the Purchase Agreement between Lisbon and New England Wire is not a bona fide sale made in good faith[.]" It also addressed, second, whether the sale to Lisbon violated the prior arbitration award, and specifically whether it complied with Paragraph 4 of the second (2000) award. The award stated: "The sale contemplated by the Purchase Agreement between Lisbon and New England Wire . . . does not comply with the Prior Awards, it does not comply with Article IX of the Operating Agreement, and the relevant provisions of the California Corporations Code."

The second issue therefore did not require the arbitrator to interpret the meaning of Paragraph 4 of the 2000 arbitration award in the abstract and to describe sales transactions that would comply with Paragraph 4. Instead, it required the arbitrator to determine if this specific sale transaction complied with Paragraph 4. The arbitrator was required to make a finding whether NEW's sale to Lisbon of its membership interest in Cooner (1) complied, in good faith, with Article IX of the LLC Operating Agreement; (2) complied, in good faith, with relevant provisions of the provisions of the California Corporations Code; and (3) whether it included in its terms a non-compete clause of reasonable duration.

The arbitrator found that the sale violated Paragraph 4 of the second (2000) award in two of these three ways, by failing to comply with Article IX of the Operating Agreement and by failing to comply with relevant provisions of the California Corporations Code. Having found that NEW's sale to Lisbon violated Paragraph 4 in two ways, the arbitrator did not need to address the third requirement of Paragraph 4, whether the two-year non-compete clause in the NEW-Lisbon purchase agreement was of reasonable duration. This court does not review the merits, validity of reasoning, or the evidence supporting the arbitrator's finding, nor does this court review the arbitrator's decision for errors of fact or law (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 11). The finding that the NEW-Lisbon Purchase Agreement violated Paragraph 4 of the

second (2000) award in two ways was a complete determination of the questions submitted to the arbitrator.

The 2004 (third) award did "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." (§ 1283.4.) Therefore there was no conduct of the arbitrator "contrary to the provisions of this title." (§ 1286.2, subd. (a)(5).) Consequently the 2004 (third) arbitration award was erroneously vacated. The judgment should be reversed and the matter should be remanded with directions to the trial court to vacate its judgment and enter a new judgment confirming the 2004 (third) award.

C. *The Order Confirming the 2007 (Fourth) Arbitration Should Be Vacated*

Vacation of the judgment would also vacate the trial court's order confirming the 2007 (fourth) arbitration award. The res judicata doctrine precludes parties from relitigating issues which have been finally determined. Any issue necessarily decided in such litigation is conclusively determined as to the parties if it is involved in a later arbitration. (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 754-755.) The doctrine of res judicata applies to arbitration proceedings. (*Id*. at p. 755.) All factual and legal findings in an arbitration award are res judicata. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 50.) Findings in an arbitration are given collateral estoppel effect in a later arbitration, and an arbitration award therefore precludes relitigation of identical issues in a subsequent arbitration. (*Kelly v. Vons Companies, Inc*. (1998) 67 Cal.App.4th 1329, 1336.) Consequently the order confirming the 2007 (fourth) arbitration should be vacated, and the matter should be remanded to the trial court with directions to dismiss NEW's petition to confirm that petition to confirm the 2007 (fourth) award.

DISPOSITION

The judgment is reversed and remanded to the trial court with directions to vacate the order confirming the 2007 (fourth) arbitration award, to vacate the order denying the petition to confirm the 2004 (third) arbitration award and to enter a new and different order granting the petition to confirm the 2004 (third) arbitration award, and upon confirmation of the 2004 (third) arbitration award to enter a judgment reflecting those orders pursuant to Code of Civil Procedure section 1287.4. Costs on appeal are awarded to appellant Cooner Sales Company, LLC.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.